IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-974

ARTHUR E. HALL,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner Arthur E. Hall hereby petitions for a writ of certiorari to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered on August 26, 1977.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit to which this petition is addressed, is officially reported at ..... F.2d ..... (Slip Sheet at 2,018) (9th Cir. 1977); a copy of the opinion is printed in Appendix A to this petition, commencing at page 1.

The order and oral opinion of the United States District Court for the Western District of Washington, which were the subject of the Government's appeal to the Ninth Circuit, are unreported and are printed in Appendix A to this petition, commencing at pages 10 and 12.

JURISDICTION

The opinion of the Ninth Circuit, reversing the judgment of the District Court (which dismissed the criminal indictment in this case) and remanding with instructions to reinstate the indictment, was entered on August 26, 1977. A petition for rehearing and suggestion of the appropriateness of rehearing *en banc* was filed on September 9, 1977 and denied by order entered November 7, 1977. A copy of that order is printed in Appendix A, commencing at page 9. An application for extension of time in which to file a petition for writ of certiorari was filed with this Court on November 30, 1977 and was granted by order entered December 1, 1977 signed by Mr. Justice Rehnquist, extending such time for filing until January 6, 1978.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

Four questions are presented by this petition:

(1) Does the mere allegation of forfeiture in an indictment provide petitioner with the notice and concomitant opportunity to defend against the forfeiture required by the Fifth Amendment to the United States Constitution and the Ninth Circuit's first decision in this case (521 F.2d. 406 (1975)), when that forfeiture has already taken place and is the subject of a final, unappealed judgment under 19 U.S.C. § 1497?

(2) Must the Court of Appeals decide the issue of whether a prior forfeiture constitutes criminal punishment for an offense, which would bar any further criminal punishment for that same offense, prior to the trial in which the Government seeks to impose further criminal punishment?

(3) Does a forfeiture under 19 U.S.C. § 1497, involuntarily imposed by a conditional grant of probation in a criminal proceeding under 18 U.S.C. § 545, constitute criminal punishment which would bar any further criminal punishment for the same offense under the double jeopardy clause of the Fifth Amendment to the United States Constitution?

(4) Did the District Court act properly in dismissing the indictment where such was necessary to insure fairness and to protect the free exercise of the right of appeal?

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions, statutes and rules involved herein are the Fifth Amendment to the United States Constitution, Rule 7(c)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C. § 545, and 19 U.S.C. § 1497. The text of each is set forth in Appendix B.

STATEMENT OF THE CASE

On May 21, 1974, petitioner was indicted before the United States District Court (Western District of Washington) for "smuggling" in violation of 18 U.S.C. § 545, based upon his failure, when passing through customs in Seattle, Washington, to declare two rings purchased abroad as gifts for his wife and daughter. Petitioner was tried on August 19, 1974, before the Hon. William T. Beeks, sitting without a jury, and found guilty. A pre-trial motion to dismiss the indictment on the ground that the indictment did not allege the mandatory forfeiture specified in 18 U.S.C. § 545 as required by Rule 7(c)(2) of the Federal Rules of Criminal Procedure was denied by the trial judge on August 21, 1974; the trial judge ruled, however, that no forfeiture could be sought under the indictment since it had not been alleged.

On September 19, 1974, the trial judge entered judgment of conviction and sentenced petitioner to one year's probation, specifically conditioned upon his "consent" to a civil decree being entered forfeiting the rings to the United States. That same day a complaint seeking civil forfeiture under 19 U.S.C. § 1497 and a "consent" decree relating thereto were filed in the United States District Court for the Western District of Washington (C74-5605). No appeal was taken with respect to the forfeiture decree entered in that action.

Appeal of petitioner's conviction under 18 U.S.C. § 545 to the United States Court of Appeals for the Ninth Circuit resulted in the conviction being vacated and the indictment being dismissed. In a unanimous *per curiam* opinion, the three-judge panel of the Court of Appeals ruled that the "consent" to the forfeiture in the separate action was not voluntary and that the District Court erred in refusing to grant petitioner's motion to dismiss the indictment because "the court's actions, taken together, deprived petitioner of the mandatory notice to which he was entitled under Rule 7(c)(2) and the concomitant opportunity to defend against a forfeiture." Appendix A at page 17. A petition by the Government for rehearing was denied and the Government's suggestion of appropriateness of a rehearing *en banc* was rejected on September 24, 1975.

On September 15, 1975, while the Government's petition for rehearing was pending before the Ninth Circuit, the Chief U.S. Probation Officer advised petitioner by letter that he had satisfactorily completed the one year's probation to which he had been sentenced.

On October 21, 1975, a second indictment was returned charging petitioner with violating 18 U.S.C. § 545 relative to those same events. This second indictment contained an allegation of forfeiture. The jurisdiction of the United States District Court (W.D. Washington) was based upon an alleged violation of a federal criminal statute.

On November 7, 1975, petitioner was arraigned and entered a not guilty plea to the charge brought by the second indictment. A motion was made on behalf of petitioner to dismiss the second indictment based upon, *inter alia,* the grounds set forth in this petition, namely, the insufficiency of the second indictment, double jeopardy and due process. After full briefing and oral argument, the United States District Court with the Hon. Morell E. Sharp presiding, granted the motion and dismissed the second indictment, finding that to permit the Government to proceed with a second trial under the circumstances present would be "unconscionable." Appendix A at page 13.

Upon appeal by the Government, a different three-judge panel of the United States Court of Appeals for the Ninth Circuit on August 26, 1977 reversed the judgment of the District Court and remanded with instructions to reinstate

the indictment. In reaching its decision, the Ninth Circuit *inter alia*:

—found that the second indictment met the requirements of "notice . . . and the concomitant opportunity to defend against a forfeiture" specified in the decision in the first appeal even though the two rings had already been forfeited in a separate proceeding. Appendix A at page 7.

—declined to decide whether the forfeiture previously imposed constitutes criminal punishment, which would bar a second criminal proceeding for the same offense under the double jeopardy clause, "because [petitioner] may be acquitted upon retrial." Appendix A at page 5.

—held that the retrial of the petitioner under the circumstances of this case would not violate due process and that the trial court's dismissal of the indictment was improper. Appendix A at pages 5-7.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit decision is in conflict with applicable decisions of this Court upon important issues of constitutional law relating to notice and opportunity to defend in a criminal case and to the protection of the double jeopardy clause against multiple criminal punishments for a single offense. The Ninth Circuit decision also presents an opportunity for this Court to resolve a conflict among the Circuits on the often-faced question of the power of a District Court to dismiss a criminal indictment on grounds of fairness and justice. Moreover, the Ninth Circuit's decision in permitting trial to go forward upon this indictment—especially in the absence of a determination on the double jeopardy claim—so departs from the accepted, usual and efficient course of judicial proceedings as to raise serious questions of due process and to call for an exercise of this Court's power of supervision.

1. The Decision Below Conflicts With the Decisions of This Court Regarding the Constitutional Requirement of Notice of Criminal Charges.

The Ninth Circuit on the first appeal in this case held that the conviction was required to be set aside because of the absence of "notice . . . and *the concomitant opportunity to defend against a forfeiture.*" Appendix A at page 17 (emphasis added). The second Ninth Circuit opinion held that this deficiency could be cured merely by adding words of forfeiture to the second indictment even though the forfeiture had already been imposed in a separate proceeding.

It is submitted that the second opinion was incorrect. The opportunity to defend against the forfeiture, which is the reason for the notice required by the Ninth Circuit in its first opinion, has been irretrievably lost. The notice which has belatedly been given by the second indictment serves no purpose.

The Ninth Circuit's decision upholding mere notice of forfeiture without the opportunity to defend against that forfeiture as constitutionally sufficient is in direct conflict with prior decisions of this Court which give substantive effect to notice as an integral part of a defendant's opportunity to defend against a charge. *See Russell* v. *United States,* 369 U.S. 749 (1962). *See also Hamling* v. *United States,* 418 U.S. 87, 117-18, *rehearing denied* 419 U.S. 885 (1974); *United States* v. *Debrow,* 346 U.S. 374, 376 (1953); *Hagner* v. *United States,* 285 U.S. 427, 431 (1932). The constitutional right to notice, recognized by the above-cited decisions of this Court, requires the reversal of the Ninth Circuit's decision in this case, because all meaningful opportunity to defend against the forfeiture

has been lost and cannot be supplied by a mere addition of forfeiture language to the second indictment.

The Ninth Circuit attempted to avoid the effect of the prior forfeiture by noting "the possible invalidity . . . of the forfeiture proceeding." Appendix A at page 7. This suggestion cannot save the present indictment. Deficiencies in the forfeiture proceeding cannot obscure the facts that the forfeiture was imposed over three years ago in a separate proceeding that was never appealed and the property forfeited remains in the hands of the Government pursuant to a final judgment.

The Ninth Circuit also attempted to support its holding by noting that a civil forfeiture may be completed before institution of a criminal charge. Appendix A at page 7. That statement ignores both the record in this case and the finding by the Ninth Circuit on the first appeal. As discussed *infra* at page 12, the forfeiture in this case was not imposed as a civil sanction but rather as criminal punishment.

Resolution of the conflict between the decision below and constitutional principles well established by this Court warrant the granting of certiorari in this case.

2. The Decision Below Conflicts With the Decisions of This Court Prohibiting Not Only Multiple Convictions and Punishments But Also Multiple Criminal Trials for the Same Offense.

The Ninth Circuit in this case has declined to decide definitively whether the second trial would be barred by double jeopardy "because [petitioner] may be acquitted upon retrial." Appendix A at page 5. The Ninth Circuit's opinion erroneously assumes that an acquittal would elimi-

nate the second, and prohibited, jeopardy. Such reasoning ignores centuries of Anglo-American jurisprudence. There is simply no legal support for the proposition that the double jeopardy prohibition of the Fifth Amendment speaks only to double convictions or punishments. It applies equally to the trial itself regardless of outcome.

The Ninth Circuit's refusal to rule on the question of double jeopardy prior to trial is in direct conflict with decisions of this Court which have repeatedly held that the double jeopardy clause bars the Government not only from punishing an individual twice for the same offense, but also from placing an individual twice in jeopardy of such punishment. *See Breed* v. *Jones,* 421 U.S. 519 (1975); *Price* v. *Georgia,* 398 U.S. 323 (1970); *Benton* v. *Maryland,* 395 U.S. 784 (1969); *Downum* v. *United States,* 372 U.S. 734 (1963); *Green* v. *United States,* 355 U.S. 184 (1957).

The decisions of this Court require the Ninth Circuit to rule on the double jeopardy defense prior to trial and certiorari should be granted to ensure compliance with such decisions.

3. The Decision of the Court Below Permitting Retrial Conflicts with Decisions of This Court Barring Multiple Punishments for the Same Offense.

The Ninth Circuit in its second opinion erred not only in concluding that double jeopardy applied only upon conviction and punishment but also in stating that the punishment imposed in this case was civil in nature. In fact, the forfeiture was imposed in a civil proceeding under 19 U.S.C. § 1497 as criminal punishment for the 18 U.S.C. § 545 offense.

This Court in *Boyd* v. *United States,* 116 U.S. 616 (1886) recognized that "proceedings instituted for the pur-

pose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal." 116 U.S. at 634. Petitioner has been punished by a forfeiture under 19 U.S.C. § 1497, which punishment was imposed in, and as a direct result of, a criminal proceeding punishing him for a criminal offense under 18 U.S.C. § 545. Such criminal punishment now bars a second criminal proceeding for the same offense by reason of the double jeopardy clause of the Fifth Amendment to the United States Constitution.

The constitutional protection against further criminal punishment for the same offense is well established. As this Court stated in *Ex Parte Lange,* 85 U.S. (18 Wall.) 163 (1874):

> "[i]f there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offense, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party when a second punishment is proposed in the same court, on the same facts, for the same statutory offense.
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> "The argument seems to us irresistible, and we do not doubt that the Constitution was designed as much to prevent the criminal from being twice punished for the same offense as from being twice tried for it." 85 U.S. (18 Wall.) at 168, 173.

The *Lange* prohibition against multiple criminal punishments for a single offense is applicable here.[1] Contrary to the Ninth Circuit's statement, the forfeiture in this case was not civil in nature. The record plainly demonstrates that the forfeiture was imposed by reason of the criminal offense under 18 U.S.C. § 545. Upon his conviction under 18 U.S.C. § 545, petitioner was sentenced to one year's probation, specifically conditioned upon his "consent" to a civil decree of forfeiture. The trial judge refused, in fact, to sign the judgment and sentence in the criminal proceeding until the "civil" complaint had been filed and a decree of forfeiture "consented" to by petitioner. Reporter's Transcript, Sept. 19, 1974, pp. 11-12. As was admitted by the Government in oral argument before the Ninth Circuit on the first appeal of this matter and as noted by the Ninth Circuit in its first opinion, petitioner's "consent" under such circumstances cannot be characterized as "voluntary." Appendix A at pages 16-17. The Ninth Circuit in its prior decision recognized that the forfeiture was criminally imposed when it set aside the criminal conviction and indictment for failing to give notice of the forfeiture in the criminal proceeding. Appendix A at pages 14-17.

The suggestion by the Ninth Circuit in its second opinion that the forfeiture may be invalid "as a result of the prior reversal" is without merit. The proceeding in which the forfeiture was imposed (C74-5603) was concluded with the entry of judgment on September 19, 1974; no appeal has been taken; and the property forfeited remains in the

[1]This Court in *One Lot Emerald Cut Stones* v. *United States*, 409 U.S. 232 (1972), permitted an action to be brought under 19 U.S.C. § 1497 after an acquittal under 18 U.S.C. § 545, having concluded that the forfeiture under Section 1497 was being sought in that case as a civil remedy rather than a criminal penalty. 409 U.S. at 237. Such is not the case here where 19 U.S.C. § 1497 has been used as a criminal penalty.

hands of the Government. The manner of imposition of forfeiture obviously affected the Ninth Circuit's first decision reversing the conviction, but that did not, without an appeal of the forfeiture judgment, give the Ninth Circuit jurisdiction over the forfeiture proceeding nor has the Ninth Circuit taken any action to reach out and set the forfeiture aside, even though requested to do so by the Government in its petition for rehearing of the decision on the first appeal. Thus, the forfeiture still stands, despite the improper manner of its imposition, and constitutes criminal punishment for the offense at issue in this proceeding.

Accordingly, it is submitted that certiorari should be granted to insure that petitioner is accorded the protections of the double jeopardy clause.

4. The Decision Below Raises the Important and Recurring Question of the Power of a District Court to Dismiss a Criminal Indictment on Grounds of Fairness and Justice.

The Ninth Circuit held that the District Court had no power to dismiss an indictment and terminate a criminal prosecution on the grounds of fundamental fairness where it specified no other "legal" grounds. The Ninth Circuit's position on this important and frequently-faced issue is in conflict with that of other Circuits. See cases cited at page 16 *infra*.

Upon motion, and after the matter was fully briefed and argued, the District Court in its oral opinion in this case found that: (1) the problems identified by petitioner's motion to dismiss arose because of the Government's failure to properly indict at the outset; (2) petitioner had already endured the burdens and costs of a trial as well as an appeal to set aside the unlawful conviction obtained under that defective indictment; (3) petitioner had already made his forfeiture; (4) petitioner had fully served his sentence

under the control of the criminal justice system as a sentenced felon and could not be sentenced further absent additional information (which the Government admitted it did not have); and (5) the objective of deterrence with respect to petitioner and others had been fully met. Appendix A at page 13.

Under all these circumstances, the District Court concluded that to permit the proceedings to continue would be "unconscionable" and dismissed the indictment. We submit that such actions were within the District Court's power and obligation to insure that the proceedings before it afford a criminal defendant the fundamental fairness required by the due process clause of the Fifth Amendment to the United States Constitution.

None of the legitimate objectives of the criminal justice system can be furthered by retrial of a defendant who has already been tried and fully punished once in relation to the specific conduct in question. The purpose of the criminal process is the imposition of punishment upon those who break the rules of society. Sentence is the goal; trial is simply the necessary means to attain that end in the fairest possible manner. In the present case the Government is attempting to utilize those means without any justifying end. The Government already has exacted its full measure of legitimate punishment. As was noted by the District Court in its opinion and as conceded by the Government, the landmark case of *North Carolina* v. *Pearce,* 395 U.S. 711 (1969), precludes the imposition of an additional sentence on petitioner even should he be convicted upon the second indictment.[2] Moreover, the Government has

[2]*Pearce* permits a greater sentence on retrial only if supported by objective factual information concerning identifiable conduct of the defendant occurring after the time of the original sentencing proceeding and then only if such factual information is set forth in the record. The District Court took note in its opinion that no such factual information exists in the present case (Appendix A at page 13), and the Government has admitted that it knows of no such facts (Reporter's Transcript, Dec. 12, 1975, pp. 3-4).

candidly admitted that it is not seeking further punishment, only a conviction.

The trial process itself inevitable takes an enormous toll on an individual in terms of time, expense and public humiliation. To permit the Government to put an individual through such an ordeal where no sencence may be imposed and where no societal interest would be served thereby is to use the ordeal of trial itself as punishment. By the time the system of judicial safeguards are brought into play and a detached and independent officer of the judiciary renders his verdict on the merits, the full measure of punishment will have already been suffered to no constructive end. Trial used in this way is a punishment imposed at the whim of the prosecutor and amounts to nothing less than usurpation of the sentencing power which under Rule 32 of the Federal Rules of Criminal Procedure is given exclusively to the trial judge.

The District Court specifically found that no legitimate societal interest could be served by a retrial of petitioner. The only purposes of the trial sought by the Government are harassment resulting from the trial process and imposition of the collateral sanctions accruing from possible conviction—neither of which are legitimate objectives of the criminal justice system. Under the circumstances, the District Court's dismissal of the indictment was necessary to comport with the fundamental fairness guaranteed by the due process clause.

Additionally, as this Court noted in *North Carolina* v. *Pearce, supra,* penalizing those who choose to exercise their right of appeal "would be patently unconstitutional." 395 U.S. at 723. That such a proscribed penalty is the motivating force behind the Government's attempted retrial of petitioner is evident in the Government's assertion before the Ninth Circuit that petitioner should not be allowed to

"escape conviction merely because he had the economic means to sustain a lengthy court battle on the technicalities of pleading." Government Brief, Ninth Circuit Court of Appeals, p. 12. In essence, the Government is seeking to justify a retrial by the fact that petitioner successfully appealed an unlawful conviction.

Finally, dismissals under Rule 12(b) have traditionally been used by the federal courts in the exercise of their supervisory powers over the administration of justice where the trial judge has determined that a prosecution brought by the Government would perpetrate an injustice or otherwise defeat the ends of public justice and bring the courts into disrepute. *United States* v. *Dooling,* 406 F.2d 192, 196-98 (2d Cir. 1969); *United States* v. *Apex Distributing Co.,* 270 F.2d 747, 756 (9th Cir. 1959); *United States* v. *Heath,* 260 F.2d 623 (9th Cir. 1958); *United States* v. *Banks,* 383 F.Supp. 389 (D.S.D. 1974), *appeal dismissed,* 513 F.2d 1329 (8th Cir. 1975); *United States* v. *Kane* 243 F.Supp. 746, 752-54 (N.D. Ala. 1974) (recognizing the power to dismiss the indictment "in the exercise of its supervisory power over the administration of criminal justice" but denying relief without prejudice to defendant's renewal of his motion at trial); *United States* v. *Jones,* 322 F.Supp. 1110, 1112 (E.D. Pa. 1971). *See also* Note, "The Supervisory Power of the Federal Courts," 76 Harv.L.Rev. 1656 (1963).

This responsibility of the trial judge to preserve the fairness of court proceedings has its roots in the common law and is inherent in the very nature of the judicial office. This inherent power is required not merely to permit judges "to do justice" (*United States* v. *Apex Distributing Co. supra,* at 756), but it is a necessary tool to carry out the oft repeated admonition of this Court that judges be vigilant to "preserve the purity of [the] courts" (*Sorrells* v. *United States,* 287 U.S. 435, 466 (1932)), and prevent the

courts from being used by the executive branch in a way that impugns the "judicial integrity so necessary in the true administration of justice" (*Mapp* v. *Ohio,* 367 U.S. 643, 660 (1961)).

Exercising this responsibility, the District Court dismissed the second indictment after finding that to permit the Government to retry petitioner would be "unconscionable." This finding is amply supported by the record before the District Court, and its dismissal of the indictment was a proper exercise of the District Court's inherent power to do justice and ensure the fairness of criminal proceedings in the federal courts under the due process clause.

It is submitted that certiorari should be granted to clarify the power of a District Court to dismiss an indictment before trial both under the Fifth Amendment and in the exercise of the court's inherent power to do justice.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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January 5, 1978.

APPENDICES

APPENDIX A

United States Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* v. ARTHUR E. HALL, *Appellee.*	No. 76-1080 OPINION

[Filed August 26, 1977]

Appeal from the United States District Court
Western District of Washington

Before: DUNIWAY and KILKENNY, Circuit Judges, and LUCAS, District Judge.*

KILKENNY, Circuit Judge:

The government appeals from an order dismissing an indictment charging appellee with a violation of 18 U.S.C. § 545 [smuggling into the United States merchandise which should have been invoiced].

BACKGROUND

In 1974, the appellee was charged with having smuggled two diamond rings into the United States in violation of the above statute. Having waived a jury, he was tried by the court and found guilty. Subsequently, he was sentenced to one year's probation on condition that he "consent" to

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*The Honorable Malcolm Lucas, United States District Judge for the Central District of California, sitting by designation.

the entry of a civil decree of forfeiture of the rings pursuant to the provisions of 19 U.S.C. § 1497. He consented to the condition, the rings were forfeited to the government, and his probationary period expired on September 15, 1975.

Later, the appellee appealed to this court; he claimed that the indictment failed to state that the rings would be forfeited to the government, as required by Rule 7(c)(2), FRCrimP, and that, consequently, the indictment was insufficient to charge him with a crime. We held that the indictment was fatally defective and in June, 1975, vacated the conviction and ordered a dismissal of the indictment. *United States* v. *Hall,* 521 F.2d 406 (CA9 1975). There was no appeal from the civil decree forfeiting the rings.

Upon remand to the district court, a second indictment was returned against appellee charging him with the identical offense mentioned in the first indictment. This time, however, the instrument included the language necessary to comply with the requirements of our decision on the first appeal. To this indictment, the appellee entered a plea of not guilty and immediately moved to dismiss upon several grounds, including double jeopardy, abuse of prosecutorial discretion, inapplicability of 18 U.S.C. § 545, and indictment insufficiency. In December, 1975, the district court rejected the appellee's contentions, but dismissed the indictment on the ground that it would be "unconscionable" to retry the appellee.[1]

We find it necessary to reverse.

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[1]The relevant part of the district court order follows:

" . . . But what I do find is that in the context of this particular case, *I think that it would be unconscionable* to proceed further against Mr. Hall. He has made his civil forfeiture, he has had the heavy expense of trial and then appeal and then preparation for this matter. He served his sentence, true, it was a probationary sentence, but nevertheless, he was under the control of the criminal justice system as a sentenced felon, and recognizing that, as I do, and as I think I must and as I am entitled to, that the court could not impose a sentence in this case even were a conviction obtained.

"I just don't think that it is appropriate to proceed further just for the purpose of tagging this defendant as a felon. I think that the deterrence, if we are talking about deterrence of others and of this defendant, deterrence has been had by the process that has taken place so far. . . . " [Emphasis supplied].

THE DOUBLE JEOPARDY CLAIM

Although rejected by the district court, the appellee again urges his claim of double jeopardy.

In a long line of cases commencing with *Ball* v. *United States,* 163 U.S. 662, 672 (1896), the Supreme Court has held that the constitutional guaranty against double jeopardy imposes no limitation whatever upon the power of the court *to retry* a defendant who has succeeded in getting his first conviction set aside. The Supreme Court has firmly adhered to this doctrine in the more recent cases of *North Carolina* v. *Pearce,* 395 U.S. 711, 719-726 (1969); *United States* v. *Tateo,* 377 U.S. 463, 465 (1964); *Forman* v. *United States,* 361 U.S. 416, 425 (1960); *Bryan* v. *United States,* 338 U.S. 552, 560 (1950); and *Stroud* v. *United States,* 251 U.S. 15, 18 (1919). We reject the appellee's contrary contention on the basis of these cases.

The appellee's principal argument on this issue is that if the case is retried, he would be subject to multiple punishment for the same offense. We are fully aware of the prohibition against multiple punishment and concede that in the absence of special circumstances, the trial court would be restricted to the sentence it imposed upon the previous conviction in which case the appellee will have no additional time to serve. This precise question, however, was faced in *Pearce* where the Court held that neither the double jeopardy clause nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. *Pearce* at 723. The Court there held that a trial judge is

not constitutionally precluded from imposing a new sentence, whether greater or less than the original sentence, in the light of events subsequent to the first trial that may have thrown new light upon the defendant's "life, health, habits, conduct, and mental and moral propensities." The Court noted that such information might come to the judge's attention from evidence adduced at the second trial itself, from a new presentence investigation, from the defendant's prison record, if any, or, possibly from other sources. *Pearce* at 723. On a new trial, the district court [in passing sentence if appellant is found guilty] could even pass on his candor while a witness. *United States* v. *Lustig*, ...F.2d ..... (Slip Sheet at 1276) (CA9, June 15, 1977); *United States v. Cluchette*, 465 F.2d 749, 754 (CA9 1972). Beyond that, "[t]he freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle ... that a state may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'" *Williams* v. *New York*, 337 U.S. 241, 247 (1949), quoted in *Pearce* at 723. We agree with this reasoning and accordingly find no impediment to retrial of the appellee. His position is neither better nor worse than that of any other defendant faced with a retrial after successfully attacking his original conviction.

Appellee's attempt to bring into play the doctrine taught in *Ex parte Lange*, 85 U.S. (18 Wall.) 163 (1874) is unavailing. There, the trial court imposed a fine and imprisonment where the statute prescribed only a fine *or* imprisonment. The Supreme Court correctly held that once the fine was paid, the government could not return in an attempt to modify the judgment to include imprisonment. This in inapposite here because the Supreme Court has held, contrary to the argument of the appellee, that the forfeiture procedures of 19 U.S.C. § 1497 are civil, *One Lot Emerald*

Cut Stones v. *United States*, 409 U.S. 232 (1972), and the double jeopardy clause is not implicated in the absence of multiple *criminal* punishments. *Id.* at 235-6. We need not definitively decide this issue, however, because the appellee may be acquitted upon retrial. For the same reason, we decline to comment upon the present validity of the original forfeiture judgment.

In short, we hold that the appellee may be retried without offending the double jeopardy clause even though he has completed a probationary period. If a greater sentence is imposed upon retrial, the requirements of *Pearce, supra*, and its progeny shall be followed.

PROPRIETY OF THE PROSECUTOR'S ACTION

The appellee argues that retrial would constitute an abuse of prosecutorial discretion and that, therefore, the district court's dismissal of the indictment was a proper exercise of its inherent power to do justice. We disagree on both grounds.

In seeking the indictment after remand, the prosecutor was doing nothing more than exercising his discretion under 28 U.S.C. § 547 under which he has a duty to "... prosecute for all offenses against the United States; ..." The power vested under this section gives the United States Attorney a broad discretion in determining which cases to file. *United States* v. *Nixon*, 418 U.S. 683, 693 (1974); *United States* v. *Alessio*, 528 F.2d 1079, 1081 (CA9 1976), *cert. denied* 426 U.S. 948 (1976); *United States* v. *Cox*, 342 F.2d 167 (CA5 1965), *cert. denied* 381 U.S. 935 (1965). We acknowledge the fact that there are limits upon this discretion, but hold that none of them are here applicable.

In arguing that the district judge's action was a proper exercise of his inherent power to do justice, the appellee mistakenly relies upon *United States* v. *Apex Distributing*

Co., 270 F.2d 747 (CA9 1959); *United States* v. *Heath*, 260 F.2d 623 (CA9 1958), and other similar cases. None involved the dismissal of an indictment under circumstances which even resemble those here; both of the cited cases were properly dismissed for unnecessary delay in bringing the accused to trial. We find other Ninth Circuit authority to be controlling. In *United States* v. *Real*, 446 F.2d 40 (CA9 1971), where an indictment was dismissed by the district court "in the interest of justice," we said that:

> "... The district court's merciful inclinations appear entirely appropriate in view of the nature of the offense, of Eck's youth, his lack of any prior criminal record, and his good conduct during the rehabilitative year. *However, we are unable to find any authority permitting judicial discretion to be substituted for prosecutorial discretion in dismissing the indictment.*" [Emphasis supplied].

See also United States v. *Hudson*, 545 F.2d 724 (CA10 1976) [illness of the accused does not afford a legal basis justifying dismissal of an indictment by the court on its own motion]; *United States* v. *De Diego*, 511 F.2d 818, 824 (DC Cir. 1975) ["A trial judge has no discretion to end prosecutions unless there are legal grounds for the exercise of discretion."]. Our most recent consideration of this separation of powers issue is *United States* v. *Chanen*, 549 F.2d 1306, 1313 (CA9 1977), which also supports our holding.[2] Additionally, we find nothing in the Federal Rules of Criminal Procedure which would authorize the district court to dismiss the indictment for the reason given. *Cf. United States*

[2] "Nevertheless, given the constitutionally-based independence of each of the three actors—court, prosecutor and grand jury—we believe a court may not exercise its 'supervisory power' in a way which encroaches on the prerogatives of the other two unless there is a clear basis in fact and law for doing so. *If the district courts were not required to meet such a standard, their 'supervisory power' could readily prove subversive of the doctrine of separation of powers.*" 549 F.2d at 1313. [Emphasis supplied]. [Footnote omitted].

v. *Bryant*, 471 F.2d 1040 (DC Cir. 1972), *cert. denied* 409 U.S. 1112 (1973); *United States* v. *Weinstein*, 452 F.2d 704, 714 (CA2 1971), *cert. denied* 406 U.S. 917 (1972).

Related to the appellee's claim that the dismissal was necessary to insure fundamental fairness, and interwoven with the ever-present contention that he has *already served* his sentence, is his suggestion of prosecutorial vindictiveness. His reliance upon *North Carolina* v. *Pearce, supra*, is totally misplaced. The unsoundness of his argument is made manifest by the holding in *Pearce* that a more severe sentence may be imposed on retrial if the reasons are made to appear of record so that they may be reviewed on appeal. 395 U.S. at 726. There is no indication here that the appellee was reindicted for the exercise or attempted exercise of some procedural right as in *Blackledge* v. *Perry*, 417 U.S. 21 (1974); *United States* v. *DeMarco*, 550 F.2d 1224 (CA9 1977); or *United States* v. *Ruesga-Martinez*, 534 F.2d 1367 (CA9 1976). Moreover, there is absolutely nothing in this record indicative of any vindictiveness, or, indeed, any appearance of vindictiveness. The finding of the district court that there was no prosecutorial abuse must be upheld.

SUFFICIENCY OF THE INDICTMENT

There is no doubt but that the indictment conforms to the requirements stated in the previous appeal, *United States* v. *Hall, supra*. The appellee, however, argues that since the rings had previously been forfeited pursuant to a civil proceeding, the indictment was defective in again mentioning the forfeiture of the rings. At the outset, the appellee is confronted with the possible invalidity [in light of our earlier reversal] of the forfeiture proceeding. Beyond that, there is nothing in the statutes which precludes the completion of a civil forfeiture proceeding prior to the institution of a criminal charge. This contention is without merit.

APPLICABILITY OF 18 U.S.C. § 545

The appellee makes a tenuous argument that Congress intended to criminally sanction only those persons smuggling merchandise into the United States for resale or other commercial purposes. He suggests that the rings in question were for personal use and consequently not covered by the statute. There is nothing in the legislative history, or in any case, which supports this claim; we reject it on the basis of the expansive language of the statute itself. We hold that the statute and its amendments were written to proscribe *all* smuggling, be it for personal use or commercial use.

OTHER CONTENTIONS

We have examined all of the other contentions of the appellee and find them to be without merit.

CONCLUSION

We hold that on these facts the district court had no power to dismiss an indictment on the ground that ". . . it would be unconscionable to proceed further . . ."

The judgment of the district court is vacated and the indictment is reinstated.

IT IS SO ORDERED.

United States Court of Appeals

NINTH CIRCUIT

UNITED STATES OF AMERICA, *Appellant,* v. ARTHUR E. HALL, *Appellee.*	ORDER

[Filed November 7, 1977]

Appeal from the United States District Court
Western District of Washington

Before: DUNIWAY and KILKENNY, Circuit Judges, and LUCAS, District Judge.*

The panel as constituted in the above case has voted to deny the petition for rehearing and recommend rejection of a rehearing in banc.

The full court has been advised of the suggestion for an in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. FRAP 35 (b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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*The Honorable Malcolm Lucas, United States District Judge for the Central District of California, sitting by designation.

United States District Court
Western District of Washington
At Seattle

UNITED STATES OF AMERICA, *Plaintiff,* vs. ARTHUR E. HALL, *Defendant.*	No. CR-75-332S ORDER DISMISSING INDICTMENT

[Filed December 19, 1975]

THIS MATTER came on for hearing in open court on December 12, 1975, upon a motion by the defendant to dismiss the indictment. The defendant was represented by James C. Gaither of Cooley, Godward, Castro, Huddleson & Tatum, and Evan L. Schwab and Kevin F. Kelly of Davis, Wright, Todd, Riese & Jones. The United States was represented by Robert H. Westinghouse, Assistant United States Attorney.

The court having heard argument of counsel and having considered the legal memoranda submitted by counsel and it being fully advised, now, therefore, for the reasons set forth in the court's oral opinion on December 12, 1975,

IT IS ORDERED, that the motion of defendant to dismiss the indictment against him (*United States* v. *Arthur E. Hall,* No. CR-75-332S) be and the same is hereby granted with prejudice.

DATED this 18th day of December, 1975.

MORELL SHARP, JUDGE
United States District Court
for the Western District of
Washington

Approved as to Form and Notice
of Presentation Waived:

STAN PITKIN
UNITED STATES ATTORNEY

By _____
Robert H. Westinghouse
Assistant United States Attorney

Presented by:

DAVIS, WRIGHT, TODD, RIESE
& JONES
Evan L. Schwab
Kevin F. Kelly

By _____

IN THE

District Court of the United States for the Western District of Washington at Seattle

UNITED STATES OF AMERICA, *Plaintiff,* vs. ARTHUR E. HALL, *Defendant.*	No. CR75-332S

TRANSCRIPT OF PROCEEDINGS had in the above-entitled and numbered cause in the above-entitled court before the Honorable MORELL E. SHARP, United States District Judge, on Friday, December 12, 1975, at the United States Courthouse, Seattle, Washington.

• • •

THE COURT: Having read the briefs and heard the argument by counsel for the government, I am ready to rule.

In the first place, I would like to say I don't believe that we are dealing with a double jeopardy question, I am inclined to agree with the government on that, nor do I believe that we have a flagrant abuse of prosecutorial discretion or function by the government proceeding with this re-indictment, and I suppose in criminal law we really don't deal with theories of estoppel against the government, equitable estoppel, although, I can't help but think that there is some kind of an estoppel element in this particular case.

The problem, of course, started by the failure to properly indict at the outset. I recognize that Judge Beeks had that problem before him and that it was not a clear course charted as far as the statute is concerned in the indicting process, but nevertheless, the problem did start by the improper indictment. But what I do find is that in the context of this particular case, I think that it would be unconscionable to proceed further against Mr. Hall. He has made his civil forfeiture, he has had the heavy expense of trial and then appeal and then preparation for this matter. He served his sentence, true, it was a probationary sentence, but nevertheless, he was under the control of the criminal justice system as a sentenced felon, and recognizing that, as I do, and as I think I must and as I am entitled to, that the court could not impose a sentence in this case even were a conviction obtained.

I just don't think that it is appropriate to proceed further just for the purpose of tagging this defendant as a felon. I think that the deterrence, if we are talking about deterrence of others and of this defendant, deterrence has been had by the process that has taken place so far.

So, accordingly, I am dismissing, I am granting the motion.

Thank you.

(Court recessed.)

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellee,

vs.

ARTHUR E. HALL,
Appellant.

No. 74-3081
OPINION

[Filed June 18, 1975 as
modified by Order filed September 24, 1975]

Appeal from the United States District Court
for the Western District of Washington

Before: ELY and HUFSTEDLER, Circuit Judges, and TAYLOR,* District Judge.

PER CURIAM:

Indicted for smuggling merchandise which should have been invoiced into the United States, in violation of 18 U.S.C. § 545, Hall waived his right to a trial by jury and proceeded to trial before the district judge. Hall was convicted and sentenced to imprisonment for one year. The district judge suspended the sentence of imprisonment, however, and placed Hall on probation for one year upon

*Honorable Fred M. Taylor, Senior United States District Judge, District of Idaho, sitting by designation.

the condition that Hall would consent to civil forfeiture of the smuggled merchandise to the Government.

The indictment against Hall alleged that:

> "On or about March 15, 1974, within the Western District of Washington, ARTHUR E. HALL, willfully and knowingly and with intent to defraud the United States of America, did smuggle and clandestinely introduce into the United States of America merchandise which should have been invoiced, that is two (2) ladies diamond rings of an approximate domestic value of $14,000.00.
>
> "All in violation of Title 18 U.S.C. § 545."

In pertinent part, 18 U.S.C. § 545 provides that:

> "Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have been invoiced, . . .
>
> • • •
>
> Shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> • • •
>
> Merchandise introduced into the United States in violation of this section, or the value thereof, . . . shall be forfeited to the United States."

Hall now appeals from the judgment of conviction in the criminal action. His principal contention is that his conviction must be reversed because the indictment against him failed to meet the requirements of Fed. R. Crim. P. 7 (c)(2). Rule 7 (c)(2) provides:

> "When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture."

Prior to his trial, Hall moved, unsuccessfully, to quash the indictment because of its noncompliance with Rule 7 (c)(2). The District Court apparently decided, however, that while the indictment was defective, the defect would not vitiate the indictment if the court ruled, in advance, that the Government would be prohibited from invoking the criminal forfeiture penalty of 18 U.S.C. § 545 in the event that Hall was convicted. Such a ruling was made, the motion to quash the indictment was denied, and Hall was convicted in the ensuing trial.

The Supreme Court added Rule 7 (c)(2) to the Federal Rules of Criminal Procedure in 1972. 406 U.S. 979, 989. The advisory committee's notes concerning the Rule reveal that it was added, along with Rules 31 (e) and 32 (b)(2), primarily to provide procedures for implementing the newly-enacted criminal forfeiture penalties contained in 18 U.S.C. § 1963 (1970)[1] and 21 U.S.C. § 848 (a)(2).[2] *See* 54 F.R.D. 143, 156-57. Nevertheless, Rule 7 (c)(2) is written in specific terms for general application. We cannot conscientiously disregard the rule's plain mandatory language; therefore, we hold that it must be applied to the criminal forfeiture penalty of 18 U.S.C. § 545. *See* Fed. R. Crim. P. 1 ("These rules govern the procedure . . . in all criminal proceedings . . . . .").

As previously noted, the District Court, after ruling that the Government could not require Hall to forfeit the smuggled rings on the basis of his section 545 conviction, then allowed Hall to "consent" to civil forfeiture of the

[1]18 U.S.C. § 1963 (1970) provides for the forfeiture of any interest in any enterprise engaged in interstate commerce that is purchased with income derived from racketeering activities or the collection of unlawful debts.

[2]21 U.S.C. § 848(a)(2) (1970) provides for the forfeiture of any profits or interests acquired through participation in a continuing criminal enterprise in violation of the federal narcotics laws.

rings in exchange for the grant of probation.[3] Our consideration of the whole record leads us to the conclusion that the court's actions, taken together, deprived Hall of the mandatory notice to which he was entitled under Rule 7 (c)(2) and the concomitant opportunity to defend against a forfeiture. In the light of the circumstances of this particular case, the District Court erred in refusing to grant Hall's timely motion to quash the indictment.

The judgment of conviction is vacated, and, upon remand, the indictment will be dismissed.

We need not reach Hall's other contentions.

REVERSED and remanded, with directions.

[3]During oral argument, the Government's attorney forthrightly conceded that, in such circumstances, Hall's "consent" cannot be characterized as "voluntary."

Appendix B

UNITED STATES CONSTITUTION

AMENDMENT V

Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation for Property

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 7(c)(2)

When an offense charged may result in a criminal forfeiture, the indictment or the information shall allege the extent of the interest or property subject to forfeiture.

FEDERAL STATUTES

18 U.S.C. § 545

Smuggling goods into the United States

Whoever knowingly and willfully, with intent to defraud the United States, smuggles, or clandestinely introduces into the United States any merchandise which should have

been invoiced, or makes out or passes, or attempts to pass, through the customhouse any false, forged, or fraudulent invoice, or document or paper; or

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law—

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.

The term "United States", as used in this section, shall not include the Philippine Islands, Virgin Islands, American Samoa, Wake Island, Midway Islands, Kingman Reef, Johnston Island, or Guam.

June 25, 1948, c. 645, 62 Stat. 716; Aug. 24, 1954, c. 890, § 1, 68 Stat. 782; Sept. 1, 1954, c. 1213, Title V, § 507, 68 Stat. 1141; June 30, 1955, c. 258, § 2(c), 69 Stat. 242.

19 U.S.C. § 1497

Same; penalties

Any article not included in the declaration and entry as made, and, before examination of the baggage was begun,

not mentioned in writing by such person, if written declaration and entry was required, or orally if written declaration and entry was not required, shall be subject to forfeiture and such person shall be liable to a penalty equal to the value of such article. June 17, 1930, c. 497, Title IV, § 497, 46 Stat. 728.